FILED
FEB 25 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

No. 798

NATIONAL WHOLESALERS, a corporation, M-D PARTS MANUFACTURING COMPANY, NATIONAL PARTS COMPANY and HENRY MEZORI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

WM. H. NEBLETT,
649 South Olive Street,
Los Angeles 14, California,
Attorney for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Opinions of the courts below 1

Jurisdiction 2

Questions presented for review 2

Statutory provisions involved 5

Statement of the case 7

The decision of the District Court 8

The decision of the Court of Appeals 13

Argument 17

I.

Reasons relied on for allowance of writ 17

II.

Fraud is a question of fact; it is not a question of law; fraud is never presumed; it must be specifically alleged and clearly proved 19

III.

The Government is bound by the tests made by ordnance and the decision of the contracting officer finding that the regulators delivered by National Wholesalers to ordnance complied with the specifications in the contract and were the exact regulators contracted to be delivered 21

IV.

The correctness of the decision of the Secretary of the Army or his authorized representative made pursuant to Armed Service Procurement Act of 1947, as amended, or pursuant to the standard disputes clause in the contract is not subject to judicial review 26

Conclusion 28

Appendix:

Pre-trial stipulation ..... App. p. 1

Opinion of the District Court, 126 F. Supp. 357 ..... App. p. 7

Findings of fact, conclusions of law, and judgment ..... App. p. 11

Opinion of the Court of Appeals, 236 F. 2d 944 ..... App. p. 18

TABLE OF AUTHORITIES CITED

CASES	PAGE
DeCambra v. Rogers, 189 U. S. 119, 23 S. Ct. 519	18, 26
Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106	7, 8, 22, 23
National Labor Relations Board v. Air Associates, Inc., 121 F. 2d 586	18, 26
National Labor Relations Board v. Volney Felt Mills, Inc., 210 F. 2d 559	18, 22
United States v. Binghamton Construction Company, 347 U. S. 171, 74 S. Ct. 438	18, 27
United States v. Enterprises, 226 F. 2d 359	18, 21
United States v. Lundstrom, 139 F. 2d 792	8, 13, 24, 25
United States v. Moorman, 338 U. S. 457, 70 S. Ct. 288	7, 8, 13, 18, 22, 23, 24, 25
United States v. Morgan, 313 U. S. 409, 61 S. Ct. 999	18, 27
United States v. National Wholesalers, et al., 126 F. Supp. 357	2
United States v. National Wholesalers, et al., 236 F. 2d 944	2
187	7, 17, 19
United States v. U. S. Cartridge Co., 95 F. Supp. 384; aff'd, 198 F. 2d 456	7, 17, 20
United States v. Wunderlich, 342 U. S. 98, 72 S. Ct. 154	7, 8, 17, 18, 21, 22
United States ex rel. Brensilber v. Bausch & Lomb Optical Company, 131 F. 2d 545; aff'd, 320 U. S. 711, 64 S. Ct.	
United States ex rel. Marcus v. Hess, 317 U. S. 537, 63 S. Ct. 379	7, 17, 20
United States ex rel. Weinstein v. Bressler, 160 F. 2d 403	17, 19
Wildermuth v. United States, 195 F. 2d 18	18, 22

STATUTES	PAGE
62 Statutes at Large, p. 928	2
United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 28, Sec. 1291	13
United States Code, Title 31, Sec. 231	2, 5, 8
United States Code, Title 31, Sec. 232	2, 8
United States Code, Title 31, Sec. 233	2, 8
United States Code, Title 41, Secs. 1-260	11
United States Code, Title 41, Secs. 151-156	12
United States Code, Title 41, Secs. 151-161	3, 7, 23

IN THE

Supreme Court of the United States

October Term, 1956.

No. .....

NATIONAL WHOLESALERS, a corporation, M-D PARTS MANUFACTURING COMPANY, NATIONAL PARTS COMPANY and HENRY MEZORI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, National Wholesalers, M-D Parts Manufacturing Company, National Parts Company and Henry Mezori, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, which reversed a judgment in favor of petitioners rendered by the United States District Court for the Southern District of California, Central Division.

Opinions of the Courts Below.

The opinion of the District Court directing that findings of fact and conclusions of law be made and judgment entered dismissing the Government's complaint is reported.

(*United States v. National Wholesalers, et al.*, 126 F. Supp. 357.) The opinion is appended to this petition.[1] The findings of fact, conclusions of law and judgment of the District Court, dismissing the Government's complaint, are also appended.[2]

The opinion of the Court of Appeals, reversing the judgment of the District Court, is appended to this petition.[3] The opinion is reported. (*United States of America, Appellants, v. National Wholesalers, et al., Appellees*, 236 F. 2d 944.) A timely petition for rehearing was filed and denied.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was dated and entered September 18, 1956.[4]

The order of the Court of Appeals denying appellees' petition for rehearing was dated and entered January 3, 1957.[5]

The jurisdiction of this Court is invoked under 62 Stats. 928; 28 U. S. C. §1254(1).

Questions Presented for Review.

1. Is it not true that the Government, in order to prevail in an action brought under the False Claims statutes, 31 U. S. C. §§231-233[6] must allege and prove the mis-

---

[1]Appendix, p. 7.
[2]Appendix, p. 11.
[3]Appendix, p. 18.
[4]R. 310.
[5]R. 311.
[6]The pertinent provisions of the False Claims statutes appear *infra*, p. 5.

representation of a material fact, either express or implied; and is it not also true that the Government cannot recover unless it shows that such false representation was knowingly made with intent to deceive an agency of the Government?

2. Can the Government recover the penalties provided in the False Claims statutes where the only issue raised by the complaint is whether or not the defendants, knowingly and with intent to deceive an agency of the Government, furnished an article to the agency inferior to the one contracted to be furnished, if the government agency, at a time when some 60% of the articles called for by the contract have been delivered, makes an investigation and finds as a fact that the items already delivered to the Government by the contracting officer complied in every respect with the specifications in the contract and the authorized contracting officer for the agency makes his written decision that the articles furnished by the contractor do so comply with the contract?

3. Do the courts have the power to review and to set aside a decision of a department head of the Government, or his authorized representative, made pursuant to congressional act,[7] unless fraud or mistake so gross as to imply bad faith upon the part of the department head or his representative enters into the decision?

4. Does not the finding of a District Court on substantial evidence, that the defendants in a suit brought by the Government under the False Claims statutes committed no fraud of any sort in relation to the bidding or

---

[7]Armed Services Procurement Act of 1947, as amended, 41 U. S. C., §§151-161, the pertinent provisions of which appear *infra*, pp. 6-7.

the performance of the contract, preclude a Court of Appeals from holding as a matter of law that the defendants had filed false claims against the Government within the meaning of the False Claims statutes?

5. Do the courts have the power to review and to set aside a decision of a department head of the Government, or his authorized representative, made under the Standard Disputes Clause[8] incorporated in a government contract, unless fraud or mistake so gross as to imply bad faith on the part of the officer making the determination enters into the decision?

6. Is not the sole power to make, terminate or modify a contract for Army supplies conferred by Armed Services Procurement Act of 1947, as amended, upon the Secretary of the Army and his authorized contracting officer; and is not a decision of the Secretary or his representative on such matters immune to judicial review?

7. Can the Government attack in the courts the decision of the Secretary of the Army, or his authorized representative, finding that an item furnished under a government contract complies with the specifications of the contract?

8. Can a federal court construe a government contract so that the effect of its construction is, as a matter of law, to make a different contract for the parties?

---

[8]Supp. R. 287, Par. 14. "DISPUTES.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under the contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail a copy thereof to the Contractor. Within 30 days from said mailing the Contractor may appeal to the Secretary of War, whose decision or that of his designated representative, representatives, or board shall be final and conclusive upon the parties hereto. Pending decision of a dispute hereunder, the Contractor shall diligently proceed with the performance of this contract."

Statutory Provisions Involved.

The pertinent provision of the False Claims Statutes of March 2, 1863, as amended, 31 U. S. C. §231, is as follows:

> "§231. Any person, * * * who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit. R. S. §§3490, 5438."

The contract of April 1, 1950, for the purchase and sale of the regulators states [Supp. R. 286]: "This contract is authorized under the authority of the Armed Services Procurement Act of 1947, Public Law 413, 80th Congress; 41 U. S. C. A. 151-161." The pertinent provisions of the Act are the following:

"§151 (a). The provisions of this chapter shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds. * * *."

"§151 (b). It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small business concerns. * * *"

"§151 (c). All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except * * *" (exceptions not pertinent).

* * * * * * * *

"§153 (a). Except as provided in subsection (b) (cost-plus-a-percentage-of-costs contracts) of this section, contracts negotiated pursuant to section 151 (c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. * * *"

* * * * * * * *

"§156 (a). The determinations and decisions provided in this chapter to be made by the agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) (exceptions not pertinent) of this section, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions, in his dis-

cretion and subject to his direction, to any other officer or officers or officials of the agency."

* * * * * * * *

"§156 (c). Each determination or decision required * * * by section 153 of this title * * * shall be based upon written findings made by the official making such determination, which findings shall be final * * *."

Statement of the Case.

The opinion of the District Court, 126 F. Supp. 357, directing the dismissal of the Government's complaint, brought under the False Claims statutes, was rendered on the authority of *United States ex rel. Brensilber v. Bausch & Lomb Optical Company* (2 Cir., 1942), 131 F. 2d 545, aff'd 1943, 320 U. S. 711, 64 S. Ct. 187; *United States ex rel. Marcus v. Hess* (1942), 317 U. S. 537, 63 S. Ct. 379; *United States v. Moorman* (1950), 338 U. S. 457, 70 S. Ct. 288; *United States v. Wunderlich* (1951), 342 U. S. 98, 72 S. Ct. 154; *Kihlberg v. United States* (1878), 97 U. S. 398, 24 L. Ed. 1106; *United States v. U. S. Cartridge Co.* (D. C. E. D. Mo., 1950), 95 F. Supp. 384, affd (8 Cir., 1952), 198 F. 2d 456.

The District Court cited the *Brensilber*, the *Marcus* and the *U. S. Cartridge Company* cases in support of its holding that the Government had failed to make a case under the False Claims statutes. The *Moorman, Wunderlich* and *Kihlberg* cases were cited to support the court's holding that the decision of the contracting officer made pursuant to authority, granted by an act of Congress,[9]

---

[9]Armed Services Procurement Act of 1947, 41 U. S. C. §§151-161, the pertinent provisions of which appear *ante* at pp. 6-7 of this petition.

and under the standard disputes clause contained in the contract was final and beyond the reach of the courts.

The Court of Appeals in reversing the judgment cited no authority to sustain its holding except one of its earlier cases, *United States v. Lundstrom* (9 Cir., 1943), 139 F. 2d 792. The *Lundstrom* decision is in direct conflict with the *Moorman, Wunderlich* and *Kihlberg* cases, *supra,* relied on by the District Court.

The Decision of the District Court.

The complaint[1] sought to recover from defendants, petitioners here, penalties and damages provided in the False Claims statute, 31 U. S. C., Section 231, for making alleged false claims against the Government. The jurisdiction of the District Court was invoked under 31 U. S. C., Sections 232, 233. The District Court held, 126 F. Supp. 357 (Appendix, p. 7), that no false claims had been filed, or fraud committed; that the question which had arisen over whether or not the regulator furnished was the regulator contracted for, had been decided by the contracting officer; and, directed the making of findings of fact, conclusions of law and judgment dismissing the plaintiff's complaint. The opinion of the District Court was incorporated by reference into its findings of fact.[2]

The District Court found[3] that, on April 1, 1950, using War Department Form 106, Schedule A and conditions

---

[1]R. 3-10.

[2]Finding XI, Appendix, p. 16.

[3]Finding III, Appendix, p. 12.

attached, the defendants contracted to supply Army Ordnance 6600 voltage regulators at $23.50 each, or $155,100.00, described by the *Item Description*[4] in the contract as:

> "Regulator, generator, Assy. Mfr's Part Nos. DR-1118502, GM-1118502, IHC-50301-R1, or equal. ORD-7069022, ORD-7069023. Ordnance Stock No. 2580-1118502. Vehicle Application SNL G541, G671, G506, G501, G508.
> (A-89%, AF-11%). Bidding DR-1118502"

It appears from the pretrial stipulation that between June 19 and September 14, 1950, National Wholesalers shipped 4086 of the voltage regulators to various arsenals in 17 shipments as directed by Ordnance. Each of the 17 shipments was accompanied by an original invoice certified by National Wholesalers[5] and by the resident ordnance inspector.[6] Each invoice, in addition to certification by the resident inspector for Ordnance and by the contractor, was certified by the Ordnance officer who received the

---

[4]Supp. R. 295.

[5]Pre-trial stipulation, Paragraph X, Appendix, page 4:

> "I certify that this above bill is correct and just, that payment therefor has not been received; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with; and that State and local sales taxes are not included in the amounts billed."

[6]Pre-trial stipulation, Appendix, page 4:

> "I certify that the articles shown in quantity shipped column have been inspected by me or under my supervision, and have been accepted as conforming to contract requirements."

regulators at the several depots to which they were shipped as follows:

> "Pursuant to authority vested in me, I certify that the above articles were received in good condition, after due inspection, acceptance and delivery prior to payment as required by law * * *."[7]

The District Court found that Army Ordnance instructed National Wholesalers, September 15, 1950, not to deliver any more of the voltage regulators until further instructions. Ordnance then made a breakdown test of one of the 4086 voltage regulators, which had already been delivered to plaintiff by National Wholesalers, and a regulator manufactured by Delco-Remy. From the test Ordnance found and determined as a fact that the two regulators "have similar characteristics and are interchangeable" and that "there is no difference in construction, materials used or methods of adjustment." Plaintiff notified National Wholesalers that the voltage regulator had been tested by Army Ordnance and found to fit the specifications of the contract as an "equal"[8] and that Ordnance had qualified the regulator under the contract as an "equal." Plaintiff instructed National Wholesalers to deliver the balance of the regulators, 2514, called for by the contract, labelled as the 4086 had been. The 2514 regulators were shipped by National Wholesalers in three shipments to points directed by Ordnance. None of the 6600 regulators were rejected upon delivery, nor was any one of them returned as being inferior or as not being in compliance with the contract[9]

---

[7]Plantiff's Exhibit 1, R. 102.

[8]Finding IV, Appendix p. 13.

[9]The contract [Supp. R. 295] provided in the *Item Specifications* that equals might be furnished.

The District Court found that the written decision of the contracting officer[1] of October 16, 1950, was made pursuant to the provisions of the Public Contracts Law, 41 U. S. C., Sections 1-260, and also pursuant to the standard disputes clause in the contract.[2] Ordnance accepted the 6600 regulators called for by the contract as being in compliance with the contract as so modified by the contracting officer.[3]

The only remaining issues after the pre-trial stipulation had been signed were these:

"FACTS TO BE LITIGATED.

I.

"Whether the defendants conspired to defraud the United States, and to present false claims.

II.

"Whether the defendants knowingly and with intent to deceive the United States delivered regulators not in conformity with the contract, and in so doing, placed on such regulators a Delco-Remy name plate, imprint, and scroll."[4]

In response to those remaining issues, the District Court made findings[5] negativing the charges of conspiracy and fraud alleged in the complaint and found specifically that the defendants had not conspired to file nor had National Wholesalers, or any one of the defendants, filed any false claim, and that the Government had suffered no damage.

---

[1]Finding V, Appendix, pp. 13-14.

[2]Supp. R. 287, Par. 14.

[3]Finding VI, Appendix, p. 14.

[4]Pre-trial stipulation, Appendix, pp. 5-6.

[5]Findings VII to XI, Appendix, pp. 14-16.

The District Court concluded, from the facts found,[6] that the defendants had not conspired to file false claims nor had they or any of them filed any false claim; that the findings of fact by plaintiff's authorized officers, that the genuine Delco-Remy regulator DR-1118502 and the 4086 regulators already delivered by defendants to Ordnance "have similar characteristics and are interchangeable," and that "there is no difference in construction, materials used, or methods of adjustment," are binding upon the plaintiff and cannot now be contradicted by the Court; that the written decision of the contracting officer for Ordnance of October 16, 1950, modifying the contract so as to qualify as "equals" 4086 regulators already delivered to the plaintiff by the defendants made pursuant to Armed Services Procurement Act of 1957, 41 U. S. C., Sections 151-156, and under the disputes clause in the contract, was final and bound both plaintiff and defendants; that the tests made by Army Ordnance and the decision of the contracting officer are immune to attack from both plaintiff and defendants; that plaintiff had suffered no damage as alleged in the complaint; and that plaintiff was not entitled to recover under the False Claims statutes either the penalties or the damages alleged in the complaint; and that the defendants were entitled to a judgment dismissing the complaint. Judgment dismissing the complaint followed.[7]

---

[6]Conclusions of Law, Appendix, pp. 16-17.

[7]Appendix, p. 17.

The Decision of the Court of Appeals.
(236 F. 2d 944, Appendix, p. 18.)

The United States appealed from the judgment of the District Court, invoking the jurisdiction of the Court of Appeals under 28 U. S. C., Section 1291. The Court of Appeals reversed the judgment and remanded the cause with directions to the District Court to enter a judgment against all of the defendants jointly and severally on eight claims for a total of $16,000.00.[8]

No authority was cited by the Court of Appeals to support its decision except one of its prior decision, *United States v. Lundstrom* (9 Cir., 1943), 139 F. 2d 792, decided by a divided court seven years prior to the decision of the *Moorman* case. The Court of Appeals expressed doubt[9] as to how much the subsequent *Moorman* decision had weakened its own decision in the *Lundstrom* case; the doubt was not resolved, as the Court adhered to its decision of *Lundstrom*.

The Court of Appeals held as a matter of law that the Item Description in the contract[1] required National Wholesalers to furnish the proprietary Delco-Remy regulator and nothing else. The Court went on to say[2] in effect that the bid of National Wholesalers was made in good faith in the belief that it could fulfill the contract by supplying Ordnance with Delco-Remy regulators ob-

---

[8]236 F. 2d 944, 951, Appendix, p. 30.

[9]236 F. 2d 950, Appendix, p. 28.

[1]Item Description, Supp. R. 295.

[2]236 F. 2d 946, Appendix, pp. 18-19.

tained from World War II surplus. After the contract was made it was learned that World War II surplus regulators would not meet the changes in specifications which now required a radio suppressor. The Court said that National Wholesalers caught in this dilemma decided it would manufacture regulators substantially meeting the specifications of the Delco-Remy model and cause them to be mislabeled with a partial Delco-Remy label and delivered to the Army.

In arriving at the conclusion that the 4086 regulators delivered were labeled with a partial Delco-Remy label for the purpose of deceiving Ordnance, the Court of Appeals undoubtedly misunderstood the record. The Item Description in the contract called for a regulator generator assembly. National Wholesalers did not manufacture the regulators it delivered to Ordnance. What actually happened is shown by paragraph IX of the pre-trial stipulation where it was stipulated between the plaintiff and the defendants:

> "That National Wholesalers delivered as hereinafter mentioned regulators assembled by itself, which regulators contained genuine Delco-Remy parts, parts obtained from suppliers of Delco-Remy, and parts procured locally."[3]

The pre-trial stipulation shows that about September 14, 1950, a dispute arose between Ordnance and National Wholesalers as to whether or not the 4086 regulators which had been inspected and accepted by Ordnance were in conformity with the requirements of the contract. One of the 4086 regulators which had been assembled by National Wholesalers and delivered to Ordnance was

---

[3]Pre-trial stipulation, Appendix, Par. 9, p. 3.

tested by Ordnance at the Detroit Arsenal.[4] The result of the test was that the 4086 regulators already delivered were found by Army Ordnance to comply with the specifications in the contract and to be acceptable by Ordnance as an equal.[5]

Here the Court's attention is again invited to the fact that the regulator generator assembly DR-1118502 contracted for was not a proprietary article of Delco-Remy. The regulators of the DR-1118502 series, together with their identifying labels, belonged to the Army.[6] The finding by the District Court that the DR-1118502 series was owned by the Army was probably somewhat influenced by the testimony of L. R. Rice,[7] chief engineer of the voltage regulator department of Delco-Remy Division of General Motors, who was called as a witness for the plaintiff. Rice testified[8] that Delco-Remy manufactured and sold very large quantities of DR-1118502 models to the Government in 1944 and 1945 but that at the end of the war Delco-Remy quit making DR-1118502's and obsoleted the drawings.

After opening its opinion, 236 F. 2d 946 (Appendix, p. 18), with the erroneous premise that it was the court's function and not that of the Secretary of the Army or his representative to determine whether or not the regulators delivered complied with the contract, the Court of Appeals accumulated its errors throughout the decision by holding that recovery of the penalties pro-

---

[4]Pre-trial stipulation, Appendix, Par. 13, pp. 4-5.
[5]Pre-trial stipulation, Appendix, Par. 15, p. 5.
[6]Findings, Par. IX, Appendix, p. 15.
[7]R. 212.
[8]R. 219-221.

vided in the False Claims statutes could be had without alleging and proving the false representation of a material fact; that such recovery could be had without proof of intent upon the part of the contractor to deceive a government agency; that the courts have the power to review and to set aside a decision of a department head of the government or his authorized representative made under authority of a congressional act without showing that fraud or mistake upon the part of the department head or his representative entered into the decision; that the courts have the power to review and to set aside a decision of a department head of the government or his authorized representative made under the standard disputes clause, incorporated in government contracts, without showing that fraud or mistake on the part of the department head or his representative entered into the decision; that a decision of the Secretary of the Army or his authorized representative to modify a contract for Army supplies made under authority of Armed Services Procurement Act of 1947, as amended, may be reviewed and set aside by the courts; that the Government may attack in the courts the finding by the Secretary of the Army or his authorized representative, that an item furnished under a Government contract complies with the specifications in the contract; that a federal court may so construe a government contract that the effect of the court's construction is, as a matter of law, to make a different contract for the parties; and, that the claims filed by the defendants were, as a matter of law, false within the meaning of the False Claims statute, although the District Court found on substantial evidence that no claim filed by the defendants was false and that the defendants and none of them had committed a fraud on the Government.

ARGUMENT.

I.

Reasons Relied on for Allowance of Writ.

(a) The decision of the Court of Appeals for the Ninth Circuit, holding that putting Delco-Remy labels on the 4086 regulators delivered prior to the time the dispute arose as to whether or not those 4086 regulators complied with the contract was fraud as a matter of law entitling the Government to recover from the defendants the penalties provided by the False Claims statute, is in conflict with the decisions of the Courts of Appeals for the Second and Eighth Circuits on the same matter. (*United States ex rel. Brensilber v. Bausch & Lomb Optical Company* (2 Cir., 1942), 131 F. 2d 545, affirmed (1943), 320 U. S. 711, 64 S. Ct. 187; *United States ex rel. Weinstein v. Bressler* (2 Cir., 1947), 160 F. 2d 403; *United States v. U. S. Cartridge Company* (8 Cir., 1952), 198 F. 2d 456, affirming the District Court for the Eastern District of Missouri (1950), 95 F. Supp. 384.)

(b) The decision of the Ninth Circuit, that notwithstanding the finding by the District Court of no fraud, fraud sufficient to sustain a recovery by the Government of the penalties provided in the False Claims statute may be presumed from the contract for the purchase of the regulators and the labeling with a Delco-Remy label, is in conflict with two applicable decisions of this Court. (*United States ex rel. Marcus v. Hess* (1943), 317 U. S. 537, 63 S. Ct. 379; *United States v. Wunderlich* (1951), 342 U. S. 98, 72 S. Ct. 154.)

(c) In holding that the Government was not bound by the decision of its own contracting officer, who found that the regulators delivered conformed to contract specifica-

tions, the decision of the Ninth Circuit is in conflict with decisions of the Fifth, Sixth and Seventh Circuits on the same matter. (*United States v. United Enterprises* (5 Cir., 1955), 226 F. 2d 359; *National Labor Relations Board v. Volney Felt Mills, Inc.* (6 Cir., 1954), 210 F. 2d 559; *Wildermuth v. United States* (7 Cir., 1952), 195 F. 2d 18.)

(d) The decision of the Ninth Circuit disapproving the findings and decision of the contracting officer for Ordnance, that the regulators delivered conformed to the contract, is in conflict with a decision of the Second Circuit on the same matter, and is in conflict with applicable decisions of this Court. (*National Labor Relations Board v. Air Associates, Inc.* (2 Cir., 1941), 121 F. 2d 586; *United States v. Binghamton Construction Company* (1954), 347 U. S. 171, 74 S. Ct. 438; *United States v. Morgan* (1941), 313 U. S. 409, 61 S. Ct. 999; and *DeCambra v. Rogers* (1903), 189 U. S. 119, 23 S. Ct. 519.)

(e) The decision of the Ninth Circuit, that the decision of the contracting officer, whether made under the statute, Armed Services Procurement Act of 1947, as amended, or under the standard disputes clause in the contract, can be attacked and set aside without showing fraud entering into the contracting officer's decision, is in conflict with applicable decisions of this Court. (*United States v. Moorman* (1950), 338 U. S. 457, 70 S. Ct. 288; *United States v. Wunderlich, supra; DeCambra v. Rogers, supra; Binghamton v. United States, supra.*)

II.

Fraud Is a Question of Fact; It Is Not a Question of Law; Fraud Is Never Presumed; It Must Be Specifically Alleged and Clearly Proved.

When the Court of Appeals for the Ninth Circuit held that fraud, entitling the Government to recover under the False Claims statutes, could be presumed as a matter of law from the contract between the Government and National Wholesalers, the Ninth Circuit rendered a decision in conflict with the decisions of the Second and Eighth Circuits on the same matter, and in conflict with applicable decisions of this Court.

It was held by the Court of Appeals for the Second Circuit in *United States ex rel. Brensilber v. Bausch & Lomb Optical Company* (2 Cir., 1942), 131 F. 2d 545, 546, affirmed by this Court (1943), 320 U. S. 711, 64 S. Ct. 187, that the liability imposed by the False Claims statute makes fraud the basis of the liability and that the statute uses the word *fraud* in its accepted sense of deceit. Bausch & Lomb were charged with having obtained an unlawful monopoly of the market which their bid did not reveal. No representation having been made by Bausch & Lomb that they had not secured an unlawful monopoly of the market, the fact that they had secured such a monopoly was held not to be fraud within the meaning of the False Claims statute. While the court said that such construction might be a strict one, it held that it would construe the statute in that way because of its drastic penal provisions.

The Second Circuit held in *United States ex rel. Weinstein v. Bressler* (2 Cir., 1947), 160 F. 2d 403, 405, that, to recover under the False Claims statute, the United States must prove the misrepresentation of a material fact.

This Court held in *United States ex rel. Marcus v. Hess* (1943), 317 U. S. 537, 551, 63 S. Ct. 379, 388, that the chief purpose of the False Claims statutes was to provide for restitution to the Government of money taken from it by fraud; and that the device of double damages plus the specific penalty of $2,000 for each false claim, was chosen by Congress to make sure that the Government would be made completely whole.

The Eighth Circuit held in *United States v. U. S. Cartridge Company* (8 Cir., 1952), 198 F. 2d 456, 462-463, affirming the District Court, 95 F. Supp. 384, that where recovery was sought under the False Claims statute because of the failure of the contractor to comply with the contract, there could be no recovery without proof of the failure of the contractor to comply.

In the case here it was stipulated by the Government in the pre-trial stipulation that all of the regulators delivered under the contract conformed to the specifications of the contract. Army Ordnance made a test of the regulator from which Ordnance found as a fact that the regulator conformed to the specifications of the contract. Later the contracting officer for Ordnance in a written decision decided that the regulator conformed to the specifications in the contract. In these circumstances the District Court found that the Government got the regulator it contracted for and that the defendants had committed no fraud within the meaning of the False Claims Act or otherwise, and ordered the Government's complaint dismissed. (126 F. Supp. 357.)

The labeling upon which the decision of the Ninth Circuit rests did not amount to fraud because the labels did not conceal an inferior regulator, and thus deceive the Government. Such concealment was the only fraud al-

leged in the complaint. The District Court said of the Item Description copied in its opinion, 126 F. Supp. 357: "That a reading of this description as a whole reveals that the numbers employed by the designated manufacturers were used to indicate the type or model, design and composition of the regulator contracted for." The Court's opinion became by incorporation therein a part of the findings of fact.

Certainly there was no fraud within the definition of fraud given by this Court in *United States v. Wunderlich* (1951), 342 U. S. 98, 100, 72 S. Ct. 154, 155. There the Court said: "By fraud we mean conscious wrongdoing; an intention to cheat or be dishonest." This Court went on to say that when fraud is relied upon by a party it "should be alleged and proved, as it is never presumed."

III.

The Government Is Bound by the Tests Made by Ordnance and the Decision of the Contracting Officer Finding That the Regulators Delivered By National Wholesalers to Ordnance Complied With the Specifications in the Contract and Were the Exact Regulators Contracted to Be Delivered.

When the Court of Appeals for the Ninth Circuit held that the Government was not bound by the decision of its own contracting officer, that the regulators delivered conformed to contract specifications, the Ninth Circuit rendered a decision in conflict with the decisions of the Fifth, Sixth and Seventh Circuits on the same matter and in conflict with applicable decisions of this Court.

The Court of Appeals for the Fifth Circuit (*United States v. United Enterprises* (5 Cir., 1955), 226 F. 2d 359, 363) held, in an action brought by a subcontractor in the name of the United States to recover from the

prime contractor, money alleged to be due on a subcontract from the prime contractor to the subcontractor, citing the *Moorman* and *Wunderlich* cases, *supra,* that the subcontractor was bound by the decisions of the Government engineer as to what work the prime contract required, and that the Government engineer's interpretation of the original contract was conclusive on the subcontractor and the Government.

The Court of Appeals for the Sixth Circuit (*National Labor Relations Board v. Volney Felt Mills, Inc.* (6 Cir., 1954), 210 F. 2d 559, 560) held, citing the *Moorman* and *Wunderlich* cases, that where an employer attacked the validity of a consent election agreement on the ground that it was obtained by fraud of an administrative officer, fraud will not lightly be inferred and in its absence or in the absence of such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment, the decision of an administrative officer under a Government contract, committing final decision to the administrative officer with the right of appeal to the head of the agency may not be set aside or repudiated.

The Court of Appeals for the Seventh Circuit in *Wildermuth v. United States* (7 Cir., 1952), 195 F. 2d 18, 21-24, reviewed a number of decisions of this Court beginning with *Kihlberg v. United States* (1878), 97 U. S. 398, 24 L. Ed. 1106, and ending with *United States v. Moorman* (1950), 338 U. S. 457, 70 S. Ct. 288, and *United States v. Wunderlich* (1951), 342 U. S. 98, 72 S. Ct. 154. Following those cases the Seventh Circuit held that when the decision under a Government contract is committed to an administrative officer, with the right of appeal to the head of the agency, the administrative officer's decision cannot be attacked in the courts except upon the ground of fraud or mistake so gross as

to imply bad faith on the part of the officer making the decision.

The decision of the Ninth Circuit on this point is also in conflict with numerous applicable decisions of this Court beginning with the *Kihlberg* case decided in 1878 and running through the *Moorman* case decided in 1950 and the *Wunderlich* case decided in 1951. The whole subject seems to have been finally settled in favor of the petitioners here by this Court in the *Moorman* case. This Court held in the *Moorman* case that a decision by the head of an agency or his authorized representative made under the standard disputes clause of a Government contract is final. This Court also held that a decision interpreting the specifications in a contract made by an agency head or his authorized representative is final and binding upon the parties where the contract declares that to be so.

In the case at bar we not only have the standard disputes clause under which it was determined by the contracting officer as a fact that the regulator furnished conformed to the specifications of the contract, but we also have the Armed Services Procurement Act of 1947, as amended, 41 U. S. C., §§151-161, under which it was determined as a fact by the contracting officer that the regulator delivered qualified as an "equal" to the spefications in the item descripton of the contract. The pertinent provisions of the Armed Services Procurement Act of 1947, as amended, are quoted *ante* under *Statutory Provisions Involved*, and clearly confer upon the Secretary of the Army and his authorized representative the power to make, terminate or modify contracts and to interpret the specifications in a contract, whose decision when made in writing, as the contracting officer did here, becomes final and beyond the reach of the courts.

The Court of Appeals for the Ninth Circuit states (236 F. 2d 950) that perhaps the finding by the contracting officer that the regulator furnished was equal to the one called for by the contract was a determination of fact which is now binding on the Government; but then goes on to say that if the decision of the contracting officer was such a binding determination upon the Government, the law in the Ninth Circuit is against the defendants, citing *United States v. Lundstrom* (9 Cir., 1943), 139 F. 2d 792. The Ninth Circuit makes the unusual observation that the *Lundstrom* case may have been somewhat weakened by *United States v. Moorman, supra,* decided seven years later. The decision here seems to be one of first impression, where it was held that the decision of an inferior court was merely weakened by a decision of the Supreme Court. The rule seems always to have been understood by the profession to be that, if a decision by the Supreme Court is applicable to all, to the extent that it is applicable, the decision of the Supreme Court overturns the ruling of the inferior court.

The Ninth Circuit made a distinction in the *Lundstrom* case between questions of fact and questions of law. The Ninth Circuit held in *Lundstrom* that, under the standard disputes clause in a Government contract, the question of whether or not the work done complied with the specifications of the contract was a question of law for the courts and not one which might be decided by the agency or his authorized representative. One of the judges dissented, holding that the interpretation of the specifications was a question of fact which would come under the

disputes clause in the contract and when made was final against the Government and the contractor. The dissenting opinion in *Lundstrom* is in accord with the decision in *Moorman* where it was held that the question of interpretation may be settled pursuant to the contract of the parties. The decision of the contracting officer in our case was made pursuant to the authority granted under the Armed Services Procurement Act as well as the disputes clause. The denial by the Ninth Circuit of the authority of the contracting officer to make, modify or terminate the contract pursuant to the provisions of the Armed Services Procurement Act of 1947, as amended, narrows and weakens the effectiveness of the well-established policy of the Congress, which is clearly expressed in the Armed Services Procurement Act, to settle without expensive litigation disputes arising under Government contracts.

The decision of the Ninth Circuit mentions the foregoing principles but holds in effect (236 F. 2d 950) that the contracting officer's letter of October 16, 1950, was not such a decision as was contemplated by Armed Services Procurement Act or the disputes clause. The Court said: "Especially is this true when it cannot be clearly said that the contracting officer actually determined the basic issue of whether National Wholesalers had furnished what it agreed to furnish." Thus the Ninth Circuit assailed the correctness of the decision of the contracting officer.

IV.

The Correctness of the Decision of the Secretary of the Army or His Authorized Representative Made Pursuant to Armed Services Procurement Act of 1947, as Amended, or Pursuant to the Standard Disputes Clause in the Contract Is Not Subject to Judicial Review.

When the Court of Appeals for the Ninth Circuit held that the correctness of the decision of the contracting officer, made pursuant to Armed Services Procurement Act of 1947 and the standard disputes clause in the contract, could be assailed, the Court of Appeals rendered a decision in conflict with a decision of the Second Circuit on the same matter, and in conflict with applicable decisions of this Court:

The Second Circuit held (*National Labor Relations Board v. Air Associates, Inc.* (2 Cir., 1941), 121 F. 2d 586, 591) that the Supreme Court during a period of many years, citing seven cases decided by this Court, has often condemned as both an impractical and an unwise judicial undertaking the probing of the mental processes of administrative officials engaged in reaching decisions, pursuant to statute, on the basis of the evidence presented to them.

Fifty-five years ago in *DeCambra v. Rogers* (1902), 189 U. S. 119, 121, 23 S. Ct. 519, 521, where a decision of the Land Department was attacked in the courts on the ground that the Secretary of the Interior had misconstrued the evidence and misapplied the law to the evidence, this Court held that, when a decision has been made by

the Secretary of the Interior pursuant to power vested in him by Congress, the courts will not entertain an inquiry as to the extent of his investigation, as to his knowledge of the points decided, or as to the methods by which he reached his determination.

In *United States v. Morgan* (1941), 313 U. S. 409, 422, 61 S. Ct. 999, 1004, this Court held that it is not the function of the courts to probe the mental processes of the Secretary upon whom the power of decision is conferred by statute. Just as a Judge cannot be subjected to such scrutiny so the integrity of the administrative process must be equally respected. While the administrative process has had a different development and pursues somewhat different ways from those of courts, administrative agencies are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.

In *United States v. Binghamton Construction Company* (1954), 347 U. S. 171, 177, 74 S. Ct. 438, 441, it was held that, where Congress imposed upon the head of an agency of the Government, in that case the Secretary of Labor, the authority to determine questions relating to the contract that: "The correctness of the Secretary's determination is not open to attack on judicial review."

Conclusion.

Petitioners assert with confidence that their research of the law has demonstrated that the decision of the Court of Appeals for the Ninth Circuit is in conflict with the decisions of all of the other Circuit Courts of Appeals on the same matter, and that the decision is in conflict with numerous applicable decisions of this Court. The decision of the Ninth Circuit stands alone. The Ninth Circuit has so far departed from the accepted and usual course of judicial decision of the matters decided as to call for the exercise of this Court's power of supervision.

Petitioners respectfully contend that the writ of certiorari should be granted.

Respectfully submitted,

WM. H. NEBLETT,

Attorney for Petitioners.

APPENDIX.

Pre-Trial Stipulation.

In the United States District Court in and for the Southern District of California, Central Division.

No. 15,687-WM

United States of America, Plaintiff, vs. National Wholesalers, a corporation, *et al.*, Defendants.

STATEMENT OF ADMITTED FACTS.

I.

That the defendants, National Wholesalers, Inc., M-D Parts Manufacturing Company, and National Parts Company, are affiliated entities; that each are, or were at all times pertinent herein, substantially owned and under the control of a single family; that the defendant, Henry Mezori, is and was the general manager of the three businesses.

II.

That the defendant, National Parts Company, was, in the year 1950, a regular franchised dealer of parts manufactured or assembled by Delco-Remy, selling such parts to the trade and the public in the ordinary course of business under the part numbers established by Delco-Remy. [60]

III.

That the defendant, National Wholesalers, Inc., prior to April of 1950, had bid upon Ordnance contracts, and the officers thereof were familiar with bidding forms and practices used in automotive parts procurement by Ordnance.

IV.

That the defendant, National Wholesalers, Inc., which was on Army's approved list of bidders, received an invitation for bids, denominated number DA-20-018-ORD-50-1130, in February of 1950, and, pursuant to such invitation, bid on the contract.

V.

That the bid was received, and the contract awarded to National Wholesalers, Inc., on April 1, 1950. A true photostatic copy of the contract, identified as Contract No. DA-20-018-ORD-3951, is attached to the motion for summary judgment.

VI.

That the initials and numerals "DR-1118502," "GM-1118502," and "IHC-50301-R1" appearing in the contract referred to, were understood by each party to refer to certain manufacturers and items designated by them with their part numbers as follows:

Part No. 1118502 of Delco-Remy;

Part No. 1118502 of General Motors;

Part No. 50301-R1 of International Harvester Corporation.

VII.

At the time the bid was submitted, defendant, National Wholesalers, Inc., knew that the automotive part described had been approved for procurement by the Armed Services, and it further knew that the manufacturers of the parts approved were, at the time of approval and with regard to the items submitted for approval, Delco-Remy, General Motors, and International Harvester.

VIII.

That the regulator furnished the Army by Delco-Remy as its [61] part number 1118502 bore an imprint or scroll on the cover case of a particular shape and size which spelled out the words "Delco-Remy," and also bore a name plate with the legend:

"Delco-Remy
Generator Regulator
Model 1118502
6 Volt System 40 Ampere
Negative Ground
Made in U.S.A.";

that this regulator of Delco-Remy also bore Delco-Remy's trade-mark on the inside of the cover case and Delco-Remy's serial number on the name plate. That the regulators delivered, as hereinafter mentioned by National Wholesalers, Inc., bore an imprint or scroll and name plate similar in all respects to those on regulators furnished by Delco-Remy as to size, shape, color scheme, and legend, except that they did not have the trade mark or serial number of Delco-Remy imprinted on them.

IX.

That National Wholesalers delivered as hereinafter mentioned regulators assembled by itself, which regulators contained genuine Delco-Remy parts, parts obtained from suppliers of Delco-Remy, and parts procured locally.

X.

That between June 19, 1950, and September 14, 1950, inclusive, a total of 4,086 regulators were delivered by National Wholesalers to various arsenals in 17 shipments; each such shipment was accompanied by an Invoice or

Vendor's Shipping Document containing the following certification by a person duly authorized to so certify on behalf of the defendant National Wholesalers, Inc.,

> "I certify that this above bill is correct and just, that payment therefor has not been received; that all statutory requirements as [62] to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with; and that State and local sales taxes are not included in the amounts billed."

Each invoice was also certified by the resident ordnance inspector as follows:

> "I certify that the articles shown in quantity shipped column have been inspected by me or under my supervision, and have been accepted as conforming to contract requirements."

XI.

That at the time these regulators were shipped, as above mentioned, accompanied by the said Invoices, National Wholesalers, Inc., M-D Parts Manufacturing Company, National Parts Company and Henry Mezori knew that there had been placed upon each regulator a name plate and imprint or scroll, as previously described.

XII.

That National Wholesalers, Inc., M-D Parts Manufacturing Company, National Parts Company, and Henry Mezori, and each of them, participated in the purchase, manufacture, or assembly, of parts used in the regulators shipped under the contract.

XIII.

Thereafter, a regulator assembled by defendant, National Wholesalers, Inc., was tested at the Detroit Arsenal;

that the regulator so tested was determined to be acceptable as an "or equal" under the contract.

XIV.

6,600 regulators, the number called for under the contract, were delivered by National Wholesalers to Ordnance, and accepted by Ordnance; and the full purchase price of $155,100 was paid to, and accepted by, National Wholesalers. [63]

XV.

On or about September 14, 1950, a dispute arose between Ordnance and National Wholesalers as to whether or not the 4,086 regulators which had been inspected and accepted were in conformity with the requirements of the contract. One of the regulators assembled by National Wholesalers was tested by the Detroit Arsenal in order to determine its acceptability as an "or equal"; as a result of the test, it was determined that the regulator tested qualified as an "or equal."

STATEMENT OF UNADMITTED FACTS—NOT TO BE CONTESTED.

Counsel are not presently aware of any facts in this category.

FACTS TO BE LITIGATED.

I.

Whether the defendants conspired to defraud the United States, and to present false claims.

II.

Whether the defendants knowingly and with intent to deceive the United States delivered regulators not in conformity with the contract, and, in so doing, placed

on such regulators a Delco-Remy name plate, imprint, and scroll.

III.

Whether the United States suffered damages.

Dated: September 10, 1954.

Respectfully submitted,
LAUGHLIN E. WATERS,
United States Attorney;
MAX F. DEUTZ,
Assistant United States Attorney,
Chief of Civil Division;
ANDREW J. WEISZ,
Assistant U. S. Attorney;
/s/ ANDREWS J. WEISZ.
/s/ WM. H. NEBLETT,
Attorney for Defendants National Wholesalers, M-D Parts Manufacturing Co., National Parts Co., and Henry Mezori.

[Endorsed]: Filed September 14, 1954. [64]

Opinion of the District Court 126 F. Supp. 357.

In the United States District Court in and for the Southern District of California, Central Division.

No. 15,687-WM

United States of America, Plaintiff, vs. National Wholesalers, a corporation, *et al.*, Defendants.

ORDER FOR FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT.

It appearing to the Court:

(1) That by this action the United States seeks recovery from defendants of penalties for alleged false claims against the Government under 31 U. S. C., §§231, 232, 233;

(2) That on April 1, 1950, by WD Form 106 with Schedule "A" and conditions attached, defendants contracted with the Government to supply 6,600 voltage regulators, described in the contract as:

> "Regulator, generator, Assy. Mfr's Part Nos. DR-118502, GM-1118502, IHC-50301-R1, or equal. ORD-7069022, ORD-7069023. Ordnance Stock No. 2580-1118502. Vehicle Application SNL G541, G671, G506, G501, G508. (A-89%, AF-11%) Bidding DR-1118502"; [71]

(3) That Government Forms 1034 and 405-60-C, being vouchers for purchases and shipping documents, bear certification that the contract requirements have been complied with and, as signed by defendants' representative, are alleged to be false and fraudulent because (a) defendants did not supply genuine Delco-Remy voltage

regulators manufactured by the Delco-Remy division of General Motors Corporation and (b) because the voltage regulators which were supplied by defendants were allegedly inferior to those of Delco-Remy manufacture;

(4) That ambiguities in the documents in question at bar—all having been prepared by the plaintiff—may be construed against the Government where consonant with the public interest [see 3 Williston on Contracts 1788, §621; see also, *id* §§619, 620, 626 (Rev. ed. 1936)];

(5) That the False Claims statutes, being "drastically penal," must be "strictly construed" [United States *ex rel.* Brensilber v. Bausch & Lomb Optical Co., 131 F. 2d 545, 547 (2d Cir. 1942), aff'd 320 U. S. 711 (1943)];

(6) That without regard to these rules of construction, the item contracted for is described in the contract as a "Regulator, generator, Ass[embl]y";

(7) That added to this general description are eleven different numbers in three groups—namely, the numbers by which the regulator was designated when manufactured by the different companies, its two ordnance numbers, and its five vehicle application numbers—all of which serve, instead of a lengthy recital of specifications, as brief shorthand alternative descriptions of the actual physical regulator contracted for;

(8) That a reading for this description as a whole [72] reveals that the numbers employed by the designated manufacturers were used to indicate the type or model, design and composition of the regulator contracted for;

(9) That, on a comparison and breakdown test of the regulator supplied by defendants and a regulator manufactured by Delco-Remy known to meet the contractual standard, the Army Ordnance Corps found and determined as a fact [United States v. Moorman, 338 U. S. 457, 459, 463 (1950)] that the two regulators "have similar characteristics and are interchangeable" and that there is "no difference in construction, materials used, or methods of adjustment"—an admission that in point of quality at least the defendants supplied the regulator contracted for [see United States v. Wunderlich, 342 U. S. 98, 99 (1951); Kihlberg v. United States, 97 U. S. 398 (1878); United States v. U. S. Cartridge Co., 95 F. Supp. 384, 395 (E. D. Mo. 1950), aff'd, 198 F. 2d 456 (8th Cir. 1952), cert. denied, 345 U. S. 910 (1953)];

(10) That the "Item Description" set forth in the contract specifying in part "Mfr's Part Nos. . . ., or equal" requires that the contract be construed as calling for an "or equal" regulator, and the Army Ordnance Corps found defendants' regulator to be an "or equal";

(11) that "the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud" [United States *ex rel.* Marcus v. Hess, 317 U. S. 537, 551-552 (1943)];

(12) That, though plaintiff knew before defendants delivered the last third of the regulators that Delco-Remy had not manufactured them, it accepted and paid for them and neither rejected upon delivery nor thereafter

returned any of them as inferior or as not complying with the contract; [73] and

(13) That defendants' use of a replica of the Delco-Remy name plate on their regulators, unjustifiable as it is, does not change the fact that the regulators as furnished complied with the contract as it must be here construed in the light of the ambiguities of form and content it bears.

It Is Now Ordered that defendants lodge with the Clerk within ten days proposed findings of fact, conclusions of law, and judgment of dismissal of plaintiff's complaint to be settled pursuant to local rule 7.

December 1st, 1954.

/s/ Wm. C. Mathes,
United States District Judge.

[Endorsed]: Filed December 1, 1954. [74]

Findings of Fact, Conclusions of Law, and Judgment.

In the United States District Court in and for the Southern District of California, Central Division.

No. 15,687-WM

United States of America, Plaintiff, vs. National Wholesalers, a corporation, *et al.*, Defendants.

This cause coming on regularly for trial the 21st day of September, 1954, before the Honorable Wm. C. Mathes, United States District Judge, the plaintiff being represented and appearing by its counsel, Laughlin E. Waters, United States Attorney, and Max F. Deutz, and Andrew J. Weisz, Assistants U. S. Attorney, and William M. Lytle, attorney from the Department of Justice, and the defendants National Wholesalers, a corporation; M-D Parts Manufacturing Company, National Parts Company, and Henry Mezori appearing by their counsel, Wm. H. Neblett, the action having been dismissed as to the defendants John Bertermann and Charles J. Paul, evidence, both oral and documentary, having been presented by respective counsel for the plaintiff and the defendants and the Court having heard the evidence and the arguments presented on behalf of the [75] plaintiff and the defendants, took the case under submission, October 4, 1954, and being now fully advised, renders its decision as follows:

FINDINGS OF FACT.

I.

The United States brought this action to recover from the defendants the penalties and double damages provided by 31 United States Code, Section 231; this Court has jurisdiction of the action under 31 United States Code, Sections 231, 232, and 233. No one of the defendants

was during any of the times mentioned in the complaint in the military or naval forces of the United States or in the militia called into or actually employed in the service of the United States.

II.

The defendants, National Wholesalers, Inc., M-D Parts Manufacturing Company, and National Parts Company, are affiliated entities, and they were at all of the times mentioned in the complaint substantially owned and under the control of the Mezori family. Defendant Henry Mezori, is, and has been since the organization of these entities, the general manager of the three businesses.

III.

On April 1, 1950, on War Department form 106, Schedule A and conditions attached, the defendants contracted, Contract No. DA-20-018-ORD-3951, with the Government to supply 6,600 voltage regulators described in the contract as:

> "Regulator, generator, Assy. Mfr's Part Nos. DR-1118502, GM-1118502, IHC-50301-R1, or equal. ORD-7069022, ORD-7069023. Ordnance Stock No. 2580-1118502. Vehicle Application SNL G541, G671, G506, G501, G508. (A-89%. AF-11%) Bidding DR-1118502";

The 6,600 regulators were sold to the Government at $23.50 each, or $155,100. Between June 19, 1950, and September 14, 1950, inclusive, the defendant, National Wholesalers, Inc., shipped 4086 of the voltage [76] regulators to the various arsenals as directed by the Government in 17 shipments. Each of the 17 shipments was accompanied by an original invoice, prepared by Ordnance and certified by National Wholesalers and by the resident Ordnance inspector.

IV.

On or about September 15, 1950, Ordnance instructed defendant National Wholesalers, Inc., not to deliver any more of the voltage regulators until further instructions from the Government. In the meantime, Army Ordnance Corps made a comparative breakdown test of the voltage regulator supplied by defendants and a regulator manufactured by Delco-Remy. From this test, Army Ordnance found and determined as a fact that the two regulators "have similar characteristics and are interchangeable" and that there is "no difference in construction, materials used, or methods of adjustment." Thereafter, plaintiff notified the defendants the voltage regulator had been so tested and found by Army Ordnance to fit the requirements of the contract as an "or equal," and that Army Ordnance had qualified the regulator as an "or equal" pursuant to the terms of the contract of April 1, 1950. Plaintiff then instructed the defendants to deliver the balance of the regulators called for by the contract, to wit: 2,514. Thereupon, defendants shipped the 2,514 regulators in 3 shipments to points directed by Ordnance. None of the 6,600 voltage regulators so delivered to Ordnance was ever rejected upon delivery to the Government, nor was any one of the voltage regulators returned as being inferior or as not being in compliance with the contract.

V.

The decision qualifying the 6,600 voltage regulators as "or equals" under the contract was made in writing October 16, 1950, by the contracting officer for Army Ordnance pursuant to the provisions of the Public Contracts Law, 41 U. S. C., Sections 1-260, and Contract, No. DA-20-018-ORD-3951. No appeal was taken from

this written decision of the plaintiff, settling finally in favor of the defendants [77] the question as to whether or not the 6,600 voltage regulators delivered by the defendants complied with the contract. The time for an appeal from the written decision of Ordnance expired November 15, 1950.

VI.

The Court finds that Contract No. DA-20-018-ORD-3951, dated April 1, 1950, did not require the defendants to deliver 6,600 Delco-Remy voltage regulators or any number of such regulators to the Government. The Court finds that the contract required the defendants to deliver to Ordnance 6,600 Delco-Remy voltage regulators "or equals." The defendants did fulfill all of the requirements of the contract by delivering 6,600 "equal regulators," and the Government accepted the 6,600 regulators as such "equals" and as being in compliance with the contract.

VII.

It is not true that the defendants or any of them presented to the Government, or caused to be presented to it, claims upon or against the United States of America for payment of false, fictitious, or fraudulent claims as alleged in the complaint or otherwise; it is not true that the defendants or any of them presented to the Government any false, bills, invoices, receipts, vouchers, rolls, accounts, claims, or certificates; nor is it true that any of the invoices or other papers presented to the Government contained any fraudulent entries or fictitious statements.

VIII.

It is not true that the defendants agreed, connived, or conspired to defraud the United States by obtaining

or aiding to obtain the payment or allowance of sums for fraudulent claims as alleged in the complaint or otherwise.

IX.

It is not true that the defendants fraudulently or otherwise substituted other and inferior voltage regulators and parts of their [78] own assembly and manufacture in place of the regulators called for by the contract, but, on the contrary, the defendannts did deliver to the Government the voltage regulators required to be furnished by the contract. It is not true that the voltage regulators delivered to the Government were inferior in any particular whatever to those called for by the contract, and the regulators which were delivered met exactly the specifications contained in the contract. The regulators delivered to the Government by the defendants were for exclusive Army use. The regulator is not, and never has been a patented article. It has never been sold to the public by Delco-Remy or anyone else. The description used in the contract quoted above in Finding III were symbols employed to indicate for the Military Services the type, model, design, and composition of the regulators contracted for, and so were the Ordnance numbers, particularly ORD-7069022 and 7069023.

X.

It is not true that the defendants or any of them is or has become liable to the plaintiff for the sum of $2,000.00, or any other sum, on account of the vouchers set up in the complaint or any one of said vouchers; and it is not true that the plaintiff has sustained any damage whatsoever by reason of the matters and things alleged in the complaint.

XI.

The "Orders for Findings, etc," filed December 1, 1954, is incorporated by reference herein.

CONCLUSIONS OF LAW.

I.

Jurisdiction of this action is conferred upon this Court by 31 U. S. C., Sections 231, 232, and 233.

II.

The defendants have not, nor has any one of them, committed any fraud herein as alleged in the complaint or otherwise.

III.

The findings of fact by plaintiff that the genuine Delco-Remy voltage regulator, DR-1118502, and the voltage regulators delivered [79] by the defendants to the United States "have similar characteristics and are interchangeable" and that "there is no difference in construction, materials used, or methods of adjustment" are binding on the plaintiff and cannot now be contradicted in this court.

IV.

The written decision of the contracting officer for Ordnance, made October 16, 1950, qualifying the 6,600 voltage regulators sold and delivered to the plaintiff by the defendants, as "or equals" under the contract, became final November 15, 1950. That decision was made pursuant to Congressional Act, Public Contracts, 41 U. S. C., Sections 1-260, and in compliance with Paragraph 14, Disputes of Contract, No. DA-20-018-ORD-3951. The decision of the contracting officer bound both plaintiff and defendants from the date it became final, November

15, 1950. Neither the plaintiff, nor the defendants, can now raise the questions decided that the regulators were "equals" to DR-1118502, and that the 6,600 regulators delivered by the defendants to plaintiff complied in all respects with the contract.

V.

The plaintiff is not entitled to recover from the defendants or any of them the penalties alleged in the complaint.

VI.

The plaintiff has suffered no damage as alleged in the complaint or otherwise.

VII.

The defendants are entitled to judgment dismissing the plaintiff's complaint as to them and each of them.

Let judgment be entered accordingly.

JUDGMENT.

It Is Ordered, Adjudged, and Decreed that the plaintiff take nothing against the defendants or any one of them, and that the plaintiff's complaint be, and it is, hereby dismissed.

Dated: December 16, 1954.

/s/ WM. C. MATHES,
Judge.

Affidavit of Service by Mail attached.

Lodged December 10, 1954.

[Endorsed]: Filed, docketed and entered December 16, 1954. [80]

Opinion of the Court of Appeals, 236 F. 2d 944.

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellant, vs. National Wholesalers, a corporation; M-D Parts Manufacturing Company, National Parts Company and Henry Mezori, Appellees. No. 14,692. Sep. 18, 1956.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: FEE and CHAMBERS, Circuit Judges, FOLEY, District Judge:

CHAMBERS, Circuit Judge:

National Wholesalers, a California corporation, was low bidder in the year 1950 to supply the Department of the Army with 6,600 generator regulators for motor vehicles at $23.50 each. The calls for bids had specified catalogue items DR (for Delco-Remy) 1118502, GM (for General Motors) 1118502, or IHC (for International Harvester Corporation) 50301-R1 "or equal." The bid call also made reference to Army ordnance stock numbers for the item.

By the terms of the bid call which had been previously mailed to 56 prospective bidders, it was required that if "or equal" was offered by the bidder he should so state. Not mentioning "or equal," National Wholesalers said on its bid that it was "bidding" DR-1118502 regulators. Thereupon, the proper Army contracting officer in behalf of the United States entered into a contract incorporating within it the bid. In our judgment, properly construed, the contract required the bidder to furnish the proprietary Delco-Remy regulator and nothing else.

It seems that in the background of National Wholesalers' plan to obtain the contract was its belief that it could obtain a supply of Delco-Remy regulators perhaps sold by the government as World War II surplus. It would now sell them back to the government. But due to changes

in specifications[1] on the Delco-Remy regulators, the old surplus model would not meet current specifications. Caught in this dilemma, National Wholesalers decided that it would manufacture regulators substantially meeting the specifications of the Delco-Remy model. What it made is described in the record as a "Chinese copy." The government now has some lingering contentions that the Chinese copies were not as good as the specified Delco-Remy. The trial court found that the substitutions were "equals."

The controversy here principally stems from the fact that surreptitiously National Wholesalers caused spurious Delco-Remy labels[2] to be printed which it attached to its product prior to delivery to the Army. For some months the Army, in ignorance accepted the regulators as delivered in installments by National Wholesalers in performance of its contract.[3] After 4,086 regulators of the contracted 6,600 had been inspected and received by the Army, the shoddy operation of the contractor was discovered. A "stop order" on receipt of deliveries was issued and off for testing to the Detroit Arsenal went one of the bogus regulators supplied by National Wholesalers along with a sample of the genuine Delco-Remy article. The tests were very favorable to the contractor. The substituted article, as to performance, was found to be within established limits of tolerance variations for "or equal" items.

---

[1]Mainly changes had been made in the regulator which introduced elements to insulate against interference with radios.

[2]The mislabelling was not as complete as the customary markings and labels on the genuine Delco-Remy product.

[3]Prior to September 14, 1950, National had made shipments in 17 installments, each shipment being represented by an invoice. Contemporaneously with shipment the Ordnance Department made inspections of the regulators. The inspection, by one witness, was described as a "shelf count." That is, the inspector made a casual visual inspection and verified the count. At the direction of ordnance, the regulators were consigned to various army stations or posts. Because of the various destinations, one day's shipments were sometimes represented by more than one invoice. Before September 14, 1950, there were 17 invoices which were attached to a total of ten government vouchers.

At this point the Army about faced and its contracting officer advised the contractor by letter that the counterfeit labeled product would be accepted as "or equal." So much of the case turns upon the letter that it is set forth in full as follows:[4]

---

[4]Prior to the contracting officer's letter of October 16, 1950, National Wholesalers was advised of the test results in a letter as follows:

"Ordnance Department
Detroit Arsenal
Center Line, Michigan

"Key Inspector/HSprengel/vr/287

11 October, 1950.

"In Reply
Refer to ORDMX-1
"National Wholesalers, Incorporated,
1211 South Brannick Street,
Los Angeles 23, California.

"Gentlemen:

"Reference is made to your letter dated 7 October, 1950, and in compliance with your request, inclosed herewith is a copy of the test results on Voltage Regulator, DR-1118502.

"The test results are self-explanatory and are for your information.

"For the Commanding Officer:
/s/ HAROLD SOUDER,
HAROLD SOUDER,
Assistant

cc: Los Angeles Ord. District.

(Copy)
"Job Order No. 2324-1049.
Ex. Order No. 547-60.
Report No. 517
Date: 5 October, 1950.
"Branch: Electrical.

To: Chief, Inspection Division.

Attn.: R. W. Clark, Facility Inspection.

"A. Purpose:
Comparison and operational breakdown test of two Delco-Remy Regulators, Ord. No. 7069023.
"B. Results:
Delco-Remy Regulator, Model 1118502, Serial No. 138275 and Delco-Remy identical specimen, without serial number

"All Communications Should be Accompanied
by Carbon Copy and Addressed to
Los Angeles Ordnance District
U. S. Army
35 North Raymond Avenue
Pasadena 1, California

"To Insure Prompt Attention
In Replying Refer to
LAD No. 160-96/5 Nat'l W.
Attention of Legal Br.

16 October, 1950.

"National Wholesalers, Inc.
4395 East Olympic Boulevard,
Los Angeles, California.

"Gentlemen:

Subject: Contract No. DA-20-018-Ord-3951

"Under date of 15 February, 1950, an Invitation for Bids, WD Form 106, was issued by Detroit

---

varied two-tenths of one volt, and a maximum of two amperes over a range from 1,500 to 4,000 R.P.M.

Visual inspection revealed no difference in construction, materials used, or methods of adjustment.

"C. Conclusion:

The two regulators have similar characteristics and are interchangeable.

Written by:

.....,
H. T. DESKINS.

Revised by:

.....,
T. S. BOLTON,
Chief, Electrical Branch.

Approved by:

.....,
REX H. WHITE, JR.,
"Major, Ord. Corps, Chief, Components Laboratories Division."

Ordnance District inviting the submission of bids for furnishing 6,600 each Regulator generator, Assy., Mfr's Part Nos. DR-1118502, GM-1118502, IHC-50301-R1, or equal. ORD-7069022, ORD-7069023. Ordnance Stock No. 2580-1118502. Vehicle Application SNL G541, G671, G506, F501, G508.

"Under date of 6 March, 1950, you offered to furnish 6,600 each Regulator, generator, Assy., Mfr's Part No. DR-1118502 at a price of $23.50 each; on 1 April, 1950, your bid was accepted by the Government; and under date of 12 April, 1950, the contract thereby created was transferred to the Los Angeles Ordnance District for administration.

"Subsequently Regulators were submitted to the Resident Ordnance Inspector for inspection and a total quantity of 4,086 Regulators were inspected and accepted by the Government. It then came to the attention of the Contracting Officer that Regulators which had been manufactured locally were being offered for inspection and acceptance, and on 14 September, 1950, the Resident Ordnance Inspector was therefore, instructed not to accept such Regulators pending a decision as to whether they were in conformity with the requirements of the contract.

"In this connection your attention is directed to the fact that in your bid you offered to furnish one of the approved items listed in the Invitation, and that on page 1 of Schedule 'A' of your bid you indicated by appropriate underscoring (a) that you were not a manufacturer of the articles quoted on and (b) that you do regularly carry a stock of such articles. This was construed to mean that you regu-

larly carry a stock of genuine Delco-Remy Regulators, and since the Regulators tendered for acceptance bore a Delco-Remy name plate, it was assumed that they were the approved items upon which you bid. Also, the 'Special Conditions' which constitute a part of your bid established a procedure for qualifying 'or equal' items, which had not been followed, thereby entitling the Government to cancel the contract for default pursuant to the provisions of the contract, should it elect to do so.

"The instructions previously furnished the Resident Ordnance Inspector to discontinue acceptance of such items was therefore confirmed and arrangements were made with Detroit Arsenal for the testing of one of the Regulators in order to determine its acceptability as an 'or equal.' As a result of the tests conducted by Detroit Arsenal it has been determined that the Regulator tested qualified as an 'or equal' and the Resident Ordnance Inspector is being advised and instructed accordingly.

"Very truly yours,

/s/ JOHN MacL. HUNT,
Ordnance Corps, Contracting
and Purchasing Officer."

After receiving the letter, National Wholesalers quickly finished the delivery of the remaining 2,514 regulators

under the contract and was promptly paid for these, as it had been on the first 4,086.[5]

It is to be remembered that the American intervention in Korea began on June 27, 1950. There probably was a mobilization urgency in October, 1950, and responsible officers may have thought it more important to get the remaining regulators into their supply, than it was to get into the business of litigation or to pursue those who were guilty of an imposition on the government. They overlooked the fact that one of the finest things for which this country stands is that the American label guarantees contents are the product that the label represents them to be, and that is true whether the label is on Bethlehem's steel or on Mrs. Lerua's tamales. That is one of the many things an American soldier fights for. Ill becomes its officers to traffic with deceptive labels, even if they qualify as "or equals."

In the quieter days of peace, apparently someone in the Army began to reflect on National Wholesalers' im-

---

[5]The invoices of National Wholesalers sent in as a part of each claim described the units theretofore furnished as:

"Item No.	Description of Article
1	Item 1(1) Contract—Regulator, generator, Assy. Mfr's Part Nos. DR-1118502, GM-1118502, IHC-50301-R1, Ord.-7069022, ORD-7069023. Ordnance Stock No. 2580-1118502. Vehicle Application SNL G541,G671,G506,G501,G508."

Defendants rely heavily on the "ord" (for ordnance) stock numbers, *supra*, to exculpate themselves. They say the invoice amounted to no more than saying, "We supplied one of the three proprietary numbers, DR, GM or IHC, or the ordnance stock number. Our product qualified under the ordnance stock number." This court is of the opinion that the invoice meant that one of the proprietary articles qualifying under the ordnance stock number had been supplied.

position. The case found its way to the United States Attorney's office in Los Angeles. On July 3, 1953, he filed a civil complaint against National Wholesalers, against two of its affiliated companies, and against Henry Mezori who controlled all three. It asked under the False Claims Act for $2,000 for each of the 17 false invoices submitted by Mezori's National Wholesalers, or a total of $34,000. The pertinent section (see 31 U. S. C. A. 231) is as follows:

> "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody or control of any money or other public property used or to be used in the military or naval service, who with intent to defraud the

United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated herein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval services any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

However, the district court ruled in the defendants' favor and made findings accordingly. The trial court thought the contract in its original form permitted the delivery of "or equals." Such a finding is contrary to the express terms of the contract. The court also found the substitutes were "equals" just as the Army had done.

Assuming there was no fraud alleged or proved[8] as to the "testing," the courts should accept the Army's fact determination that what was furnished was equal.

Also, the trial judge relied on the disputes clause of the contract which reads as follows:

> "Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail a copy thereof to the Contractor. Within 30 days from said mailing the Contractor may appeal to the Secretary of War, whose decision or that of his designated representative, representatives or board shall be final and conclusive upon the parties hereto. Pending decision of a dispute hereunder the Contractor shall diligently proceed with the performance of this contract."

Said the trial judge, "A dispute arose. The contracting officer decided it. The decision became final when the time for appeal within the Department of the Army went by."

There is some strength in the argument that perhaps the contracting officer when he wrote that the substitute article qualified as "equal" made a determination of fact which is now binding on the government. But on the whole, this court is of the opinion that the letter of

---

[8]Fraud was not alleged or proved, although the actual testing seems to have been limited to a visual inspection and an electrical performance test. It is not shown that durability was tested.

October 16, 1950, did not meet the issue and was not such a determination. But if it was a determination, then the law of this circuit is against the defendants. The case of United States v. Lundstrom, 139 F. 2d 792, still seems to be the law here. While it may be somewhat weakened by United States v. Moorman, 338 U. S. 457, yet this National Wholesalers' case is a much weaker one for the application of the rule contended for by the dissent in Lundstrom under Lundstrom's facts. Especially is this true when it cannot be clearly said that the contracting officer actually determined the basic issue of whether National Wholesalers had furnished what it agreed to furnish.

The court found that no claim was false. It is the opinion of this court that every one of the invoices prior to October 1, 1950, was false when made.[7] The test of whether a claim is false must be as of the date when the claim is made. There might be an exception; it might be held that if midway in performance the contracting officer and the supplier modified the contract *ab initio* on some detail of no great consequence and agreed to accept for the whole performance an "equal" that a court should say that the purpose of the False Claims Act was not to reach such a situation even though the claims had misdescribed the article. It is possible that such a modification was made here, but if so then we think such modification, so far as it runs backward, is void as against public policy. In such palming off as we have here we do not believe that the Congress ever intended

---

[7]Subject however to benefit of doubt for which allowance is made, *post*. See footnote 8.

that contracting officers should have the power to vitiate the False Claims statute.

The findings of the trial court do not single out the elements of intent. Perhaps it could be said it is implicit in some of the findings. Undoubtedly there must be the intent to work a deceit on the government. Probably the rule of Morrissette v. U. S., 342 U. S. 246, should be applied as a test. If this case involved only the manufacture of a substitute article, without the misbranding, then it should go back for a finding as to whether the parties intended to file a false claim. Then if the trial court should find that these defendants did not intend to pass off the regulators of its own manufacture as the genuine proprietary article (and be paid for it) it probably would be within its province to find the necessary intent was lacking. But with the crude and deliberate mislabeling here, there is only one reasonable conclusion that one may reach. What purpose other than to deceive could it have? In the circumstances, it is believed unnecessary to send the case back for the making of further findings, when only one conclusion is reasonable.

No count was made by the trial court as to the number of false claims, because it was of the view that no claim was false. The civil penalty provided is inexact and it would occur to us that a loose count of false claims should not be made. The vouchers on Army forms were prepared by the government. In all, 17 invoices were attached to ten vouchers for the period in dispute. In the absence of evidence that 17 payments were contemplated and that the invoices attached by the army to a single voucher were not sent in together by the supplier, and attached to vouchers by the Army as submitted, it would seem that the number of claims should be com-

puted on the number of vouchers rather than the number of invoices.

Further, the record is unclear as to 250 regulators that were genuine Delco-Remy, although perhaps they were not up-to-date models. These were included in the first 4,806 delivered. Two of the smaller vouchers represent a total of 128 regulators. It would not be amiss to hold that two claims were not proved to be false.[8]

Reversed. A new judgment will be entered against all defendants jointly and severally on eight claims for a total of $16,000.00.

(Endorsed:) Opinion. Filed, Sep. 18, 1956.

Paul P. O'Brien, Clerk.

---

[8]The sum of the regulators on the other eight vouchers varies from a low number of 208 to a high of 774. Thus, exclusion of the two vouchers representing a total of 128 regulators is as favorable to defendants as any other possible combination, assuming the validity of the conclusion that the defendants are shown to have filed false claims for 4,806 regulators (less 250 genuine Delco-Remy regulators unidentified as to any one shipment) on 17 invoices attached to ten vouchers.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	10
Conclusion	14

CITATIONS

Cases:

Faulk v. *United States*, 198 F. 2d 169	11
United States v. *Grannis*, 172 F. 2d 507, certiorari denied, 337 U.S. 918	11
United States v. *Pence*, 316 U.S. 332	11
United States v. *Rohleder*, 157 F. 2d 126	11
United States ex rel. Marcus v. *Hess*, 317 U.S. 537	11

Statute:

False Claims Act (12 Stat. 696, 698, R.S. 3490, 5438, 31 U.S.C. 231)	2, 3, 8, 10, 11, 13

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 798

NATIONAL WHOLESALERS, A CORPORATION, M-D PARTS MANUFACTURING COMPANY, NATIONAL PARTS COMPANY AND HENRY MEZORI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Pet. App. 7-17) is reported at 126 F. Supp. 357. The opinion of the Court of Appeals (Pet. App. 18-30) is reported at 236 F. 2d 944.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1956 (R. 310). A petition for rehearing, timely filed, was denied on January 3, 1957 (R. 311). The petition for a writ of certiorari was filed on

February 25, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners, who had contracted to supply the Department of the Army with Delco-Remy generator regulators and instead had manufactured their own regulators, affixed thereto counterfeit Delco-Remy nameplates, and sought and obtained payment for these regulators on the basis of invoices describing them as Delco-Remy regulators, thereby made false claims against the Government within the meaning of the civil False Claims Act.

STATUTE INVOLVED

The civil remedy provision of the False Claims Act (12 Stat. 696, 698, R.S. 3490, 5438, 31 U.S.C. 231) provides in pertinent part:

> Any person * * * who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the

United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

STATEMENT

This action was brought under the civil provisions of the False Claims Act, 31 U.S.C. 231 (*supra*, pp. 2-3) to recover damages for petitioners' fraudulent attempts to pass off on the Government as genuine Delco-Remy generator regulators, regulators assembled by petitioners with non-Delco-Remy parts and labeled by them with counterfeit Delco-Remy nameplates. The Court of Appeals for the Ninth Circuit, reversing the decision of the District Court for the Southern District of California, held as a matter of law that eight vouchers covering the shipment of these counterfeit regulators constituted false claims against the Government under the False Claims Act, and accordingly assessed against petitioners statutory damages of $16,000 (Pet. App. 18-30). The pertinent facts may be sumarized as follows:

On February 15, 1950 the Detroit Ordnance District of the Department of the Army extended a written invitation to 56 business concerns to submit bids for the furnishing of 6,600 generator regulators, "Mfr's Part Nos. DR [Delco-Remy]-1118502, GM [General Motors]-1118502, IHC [International Harvester Corporation]-50301-R1, or equal" (R. 295). The invitation stipulated (Special Condition 2e) that a bidder failing to indicate that he proposed to furnish a substitute "or equal" item would, if awarded the contract, be required to furnish the article specifically referred to, "without substitution of any kind" (R. 292). It

further stipulated (Special Condition 2d) that any bidder offering in his bid to supply a substitute item as an "or equal" was to submit "*with the bid,* all necessary specifications, drawings, bills of material and other pertinent supporting data" to enable the Army to determine whether the proposed "equal" product would be acceptable for its intended use (R. 292).

On April 1, 1950, petitioner National Wholesalers submitted a bid "[i]n compliance with * * * the * * * invitation for bids, and subject to all the conditions thereof * * *" (R. 286). Wholesalers expressly represented in its bid that it was "Bidding DR-1118502,"[1] which Wholesalers correctly understood to be a regulator manufactured by the Delco-Remy Division of the General Motors Corporation (R. 32). This bid contained no indication that Wholesalers intended to furnish an "or equal" item for the Delco-Remy regulator thus specified in the invitation nor was it accompanied by the specifications and drawings which, under the terms of the invitation, were to be supplied when the bidder intended to supply an "or equal" item (R. 295). Further, the bid stated that Wholesalers was a dealer, rather than a manufacturer, of regulators (R. 294).

This bid was accepted by the Army on the day of its receipt (R. 31). Wholesalers, however, did not deliver No. DR-1118502 Delco-Remy regulators in accordance

---

[1] This representation was necessitated by Special Condition 2a of the invitation which provided that (R. 292): "The bidder *must indicate* the part number which he proposes to furnish in the space provided alongside the items on which he is submitting a bid. Bids received which do not indicate clearly the part number which will be furnished and which, in the case of 'or equals,' are not accompanied by fully revealing specifications and drawings, may be deemed non-responsive by the Contracting Officer." [Emphasis appears in the original.]

with its bid. Instead, in conjunction with two affiliates, petitioners M-D Parts Manufacturing Company and National Parts Company, Wholesalers itself manufactured and assembled regulators for delivery to the Government under the contract (R. 33). In the manufacturing and assembling process, some genuine Delco-Remy parts were employed; other parts were acquired from and manufactured by sub-contractors of Wholesalers in the Los Angeles area who had no connection whatsoever with Delco-Remy (R. 33). After these regulators were assembled, petitioners affixed to each a counterfeit nameplate which was identical in size, shape and color scheme with the genuine nameplate used by Delco-Remy itself on its own regulators and which bore this legend (R. 33, 183):

Delco-Remy
Generator Regulator
Model 1118502
6 Volt System 40 Ampere
Negative Ground
Made in U.S.A.

These counterfeits were obtained by petitioners in the following manner. In May, 1950 one Lang, an employee of M-D Parts, appeared at the establishment of a manufacturer of nameplates named Nelson (R. 183). Using Nelson's purchase order blank, Lang placed an order for 7,000 Delco-Remy nameplates (R. 183, 185). Lang represented that he was associated with the "Thompson Distributing Company," a fictitious company, and signed the order form with the name of that company and his own name (R. 185). After he received and paid for the counterfeit nameplates, Lang insisted that Nelson return to him the

order form he had executed (R. 187). Nelson complied with this request and it was only several months later that he discovered that Lang was in actuality an employee of M-D Parts and had placed the order on behalf of petitioners (R. 185).

Between June 19, 1950 and September 14, 1950, Wholesalers delivered seventeen shipments of these regulators, manufactured by itself and bearing the spurious Delco-Remy nameplates, to various Army arsenals (R. 33). These shipments, totaling 4,086 regulators, were each accompanied by an invoice which (1) described the term being furnished as a DR-1118502 regulator; (2) *made no reference to "or equal"*; and (3) contained Wholesalers' certification that "this bill is correct and just" and that "all conditions of purchase applicable to the transactions have been complied with * * *".[2] Additionally, the invoices carried the certification of one Duffy, the resident Army ordnance inspector at Wholesalers' establishment, that he had accepted the articles as conforming to the contractual requirements (R. 103). Duffy, relying on the outward appearance of the regulators, had assumed that they were of Delco-Remy manufacture, as the certification in the invoice represented (R. 200). For this reason, after a visual inspection to make certain that, among other things, no corrosion had taken place, he had accepted the regulators as being of Delco-Remy manufacture (R. 196-197). On the basis of Wholesalers' certification, and the acceptance of the regulators by the resident ordnance inspector in the belief that they were

[2] One of these invoices is reproduced as an illustrative example at page 103 of the record. The other sixteen invoices, which also were introduced into evidence as part of Government exhibit 1 (R. 100-101), are identical in material part.

genuine Delco-Remys, the amount claimed in each of the seventeen invoices, totalling $96,021, was duly paid to Wholesalers.

On or about September 14, 1950, however, the Army discovered that the regulators that had been supplied were not of Delco-Remy manufacture but instead were "Chinese copies" (R. 116). As a result, the resident inspector was instructed not to accept any more regulators and the Contracting Officer arranged for the Detroit Arsenal of the Ordnance Corps to determine whether the balance of Wholesalers' regulators would be acceptable on an "or equal" basis (R. 117).

On October 16, 1950, the Contracting Officer wrote to Wholesalers advising that its regulator qualified as an "or equal" and that delivery of the remaining regulators called for by the contract would be accepted on that basis (R. 116-118).[3] The letter made no reference, however, to any decision by the Government to waive the misrepresentations contained in Wholesalers' certification respecting the 4,086 regulators already delivered. Instead, it specifically called Wholesalers' attention to the facts (1) that it had contracted to supply genuine Delco-Remy regulators; (2) that it failed to follow the procedure set forth in the invitation for qualifying "or equal" items; (3) that it had represented that it was not a manufacturer of regulators; and (4) that it had tendered for acceptance regulators bearing counterfeit Delco-Remy nameplates (R. 117).

On July 3, 1953, the Government brought this suit, alleging that the seventeen invoices submitted for payment by petitioners were intentionally fraudulent, and

---

[3] This letter is set out in full in the opinion of the Court of Appeals (Pet. App. 21-23).

seeking recovery of $2,000 for each such false claim under the terms of the False Claims Act, *supra*, pp. 2-3. After trial, the district court dismissed the complaint (Pet. App. 7-17), finding, *inter alia*, (1) that the contract did not require the delivery of genuine Delco-Remy regulators, but permitted delivery of "or equals," and (2) that petitioners had not submitted false claims to the Government for payment (Pet. App. 14). The court ruled also that the October 16, 1950 letter of the Contracting Officer, advising that the balance of the regulators would be accepted on an "or equal" basis, prohibited the Government from demonstrating that petitioners had failed to comply with the contract. The court also decided that the Government had suffered no damage (Pet. App. 17).[4]

On the Government's appeal, the Court of Appeals

---

[4] At the trial the Government had demonstrated that the counterfeit regulators supplied by petitioners differed in several material respects from the genuine Delco-Remy regulator which petitioners had represented they were bidding on and had certified in their invoices that they were supplying. The Government showed, for example, that the armature assemblies used in petitioners' regulators contained hinges of bronze or steel (R. 143), while the DR-1118502 regulator contained hinges made of bimetal, which possesses different electrical characteristics as well as greater flexibility under heat (R. 143-144, 223). Bimetal hinges insure constant voltage, an extremely important function of a voltage regulator (R. 227-229), while the voltage of regulators with bronze or steel hinges will vary as much as 20% (R. 227). Similarly, the upper and lower insulating plates used by petitioners were made of a paper-based phenolic substance (R. 158-163), whereas Delco-Remy employed a considerably more durable linen-based material, both in its DR-1118502 regulator, designed specifically for heavy military duty, and its other regulators made for use in large vehicles, restricting the use of paper-based plates to regulators intended for use in light passenger vehicles, where durability is not a significant factor. The District Court at first refused to receive this evidence, but subsequently ruled that it was admissible on the limited issue of whether or not the claims presented were false or fraudulent (R. 249).

for the Ninth Circuit reversed the decision of the District Court (Pet. App. 18-30). The Court of Appeals held that "the contract required the bidder to furnish the proprietary Delco-Remy regulator and nothing else" (Pet. App. 18), and accordingly that the "bogus regulators" produced by "the shoddy operation of the contractor" (Pet. App. 19) did not comply with petitioners' obligation, even if these products could qualify as "or equals." The court's opinion points out that although the Army contracting officer did agree by his letter of October 16, 1950 (*supra*, p. 7), to accept the remainder of the regulators as "or equals," this decision was made during the early months of the Korean conflict, "and responsible officers may have thought it more important to get the remaining regulators into their supply, than it was to get into the business of litigation or to pursue those who were guilty of an imposition on the government" (Pet. App. 24). The court rejected the contention that this letter constituted a binding determination under the disputes clause of the contract that petitioners had complied with their contractual obligation, holding that the letter did not meet "the basic issue of whether National Wholesalers had furnished what it agreed to furnish" (Pet. App. 28). The court further held that in any event the contracting officer did not have the power to condone false claims previously made in violation of the False Claims Act (Pet. App. 28-29). Accordingly, the court concluded on the facts of record that "every one of the invoices prior to October 1, 1950, was false when made" (Pet. App. 28), and that the "only * * * reasonable conclusion" to be drawn from the "crude and deliberate mislabeling" was that petitioners submitted these invoices with intent to deceive the Government (Pet.

App. 29). In assessing damages, however, the court decided to count as false claims, not the seventeen invoices, but only the ten vouchers to which they were attached, and, moreover, excluded two of these vouchers covering 250 regulators which may have been genuine Delco-Remys (Pet. App. 30). The court therefore ordered judgment entered against petitioners on eight false claims for a total of $16,000 (Pet. App. 30).

ARGUMENT

1. The Court of Appeals was clearly correct in holding that petitioners have repeatedly violated the False Claims Act. The undisputed facts in the record demonstrate that, from the time of their receipt of the invitation to bid on the furnishing of regulators to the Army, petitioners engaged in a course of conduct deliberately calculated to defraud the United States in the vital area of the procurement of war material. Petitioners expressly represented in their bid that they would furnish genuine Delco-Remy regulators, a representation which they sought to buttress by further representing that they were a dealer, not a manufacturer, of regulators. Despite these explicit representations they then assembled regulators themselves with non-Delco-Remy parts acquired from local concerns and delivered them to the Government on invoices in which they certified that the regulators were genuine Delco-Remys. In an effort further to conceal this deception, petitioners resorted to an ancient and recurring technique of the defrauder by placing a counterfeit nameplate on each regulator, nameplates which, in turn, were obtained by petitioners clandestinely. In reliance on petitioners' certification and the nameplates, which the Government did not know were counterfeit, the

Government accepted petitioners' regulators as the Delco-Remys called for by the contract.

All of the elements necessary to establish fraud (see *United States* v. *Pence*, 316 U.S. 332, 338) are thus present in abundant detail.[5] Petitioners knowingly, and with "intent to work a deceit on the government" (Pet. App. 29), misrepresented a material fact (the genuineness of the regulators), resulting in payment by the Government in reliance thereon. The Court of Appeals therefore properly found petitioners liable for damages under the False Claims Act and indeed, in view of the seventeen false invoices which they submitted, was perhaps too lenient in assessing liability for only eight false claims. The court's holding rests upon well settled legal principles applied to the undisputed facts of record, and, contrary to petitioners' contention (Pet. 19-20), it is fully in accord with the decisions of this Court and of other courts of appeal. See *e.g.*, *United States ex rel Marcus* v. *Hess*, 317 U.S. 537; *Faulk* v. *United States*, 198 F. 2d 169 (C.A. 5); *United States* v. *Grannis*, 172 F. 2d 507 (C.A. 4), certiorari denied, 337 U.S. 918; *United States* v. *Rohleder*, 157 F. 2d 126 (C.A. 3).

2. Petitioners attempt to avoid the consequences of their fraudulent conduct by arguing that the Contracting Officer's letter of October 16, 1950 (*supra*, p. 7) established that the counterfeit regulators complied with petitioners' contractual obligations. Petitioners

---

[5] The False Claims Act, by its express terms, obviates the necessity of proving all the five classic elements of fraud—*i.e.* (1) a false representation, (2) with reference to a material fact, (3) made with knowledge of its falsity, (4) and with the intent to deceive, (5) with action taken in reliance upon the representation. In contrast, intent is unnecessary under the Act. However, here, as we show in the text, all five elements of fraud were present.

assert that the court below failed to give binding effect to such a determination in accordance with the disputes clause of the contract and that this decision therefore conflicts with holdings of this Court and of other courts of appeals (Pet. 17-18, 21-27). The question of the degree of finality to be accorded the contracting officer's letter, however, plainly is not at issue in this case. For the letter on its face did not purport to pass on petitioners' past compliance, and even if it had, and so constituted a determination of fact under the disputes clause, the letter would not operate to relieve petitioners of liability for their fraudulent conduct.

(a) The letter on its face demonstrates that it does not purport to pass on petitioners' past compliance with the contract. As the Court of Appeals held, the Contracting Officer never "actually determined the basic issue of whether National Wholesalers had furnished what it agreed to furnish" (Pet. App. 28). At most, the letter constituted a waiver of the contractual conditions with respect to the remainder of the regulators. Apparently prompted, as the court below noted, by the "mobilization urgency in October, 1950" (Pet. App. 24), the letter indicated that the additional regulators would be acceptable as "or equals." Far from determining that the 4,086 regulators already shipped had complied with the contract, however, the letter expressly pointed out that Wholesalers had contracted to supply genuine Delco-Remy regulators, that it had failed to follow the procedure set forth in the invitation for qualifying "or equal" items, that it had represented that it was not a manufacturer of regulators, and that it had tendered for acceptance regulators bear-

ing counterfeit Delco-Remy nameplates (R. 117). *Supra*, p. 7.

(b) Moreover, even if the Contract Officer's letter were to be construed as a binding determination that the regulators delivered prior to October, 1950, were of sufficiently high standard to qualify as "or equals,"[6] petitioners would nonetheless be liable for their intentional false claims. Petitioners' liability is predicated in the first instance, not upon the *quality* of the bogus regulators, but upon the falsity of their representations as to the *source* of these items. Petitioners contracted to supply genuine Delco-Remy regulators, and represented their product as such, going to great lengths to counterfeit the appearance of the genuine item. They made no attempt to comply with the detailed requirements of the invitation to bid respecting the substitution of "or equals," but instead deliberately and fraudulently palmed off their "Chinese copies" on the Government with the clear intention that they be accepted as the genuine product and claimed payment for the regulators on that basis. Therefore, wholly apart from the merit of their counterfeit regulators, each such fraudulent claim properly subjected petitioners to the $2,000 statutory damage provision of the False Claims Act. The question of the quality of the bogus articles would affect only petitioners' liability to pay "*in addition*, double the amount of damages which the United States may have sustained by reason of the doing or committing such act * * *" (31 U.S.C. 231; emphasis added); and no such damages were awarded here.

---

[6] But see the Government's evidence to the contrary, summarized *supra*, fn. 4, p. 8.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MELVIN RICHTER,
ROBERT S. GREEN,
Attorneys.

MARCH 1957.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 420346 000